BUKIT LENANG DEVELOPMENT SDN BHD A

v.

TELEKOM MALAYSIA BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU B
GUNALAN MUNIANDY JC
[CIVIL SUIT NO: 22-766-2007]
28 JULY 2011

TORT: *Trespass - Trespass to land - Valid and subsisting court order declaring occupants' status as squatters served on second defendant - Whether second defendant's obligation to supply power under s. 24 Electricity Supply Act ceased - Failure of second defendant to comply with plaintiff's demand to cease supply of electricity and remove structures - Whether second defendant exposed itself to a claim of trespass - Whether second defendant's supply lines encroached into plaintiff's land - Whether cause of action of trespass established - Whether second defendant liable for trespass to a certain extent* C D

LAND LAW: *Trespass - Encroachment on land - Valid and subsisting court order declaring occupants' status as squatters served on second defendant - Whether second defendant's obligation to supply power under s. 24 Electricity Supply Act ceased - Failure of second defendant to comply with plaintiff's demand to cease supply of electricity and remove structures - Whether second defendant exposed itself to a claim of trespass - Whether second defendant's supply lines encroached into plaintiff's land - Whether cause of action of trespass established - Whether second defendant liable for trespass to a certain extent* E F

EVIDENCE: *Documentary evidence - Admissibility of - Maker not called as witness - Document only a photocopy without evidence as to whereabouts of primary evidence - Requirements of ss. 65 & 73 Evidence Act 1950 - Whether complied with* G

The plaintiff purchased the land ('the subject land') from one Oakfield Enterprises Sdn Bhd ('Oakfield') through a sale and H purchase agreement dated 15 May 1996. The plaintiff was aware at that time of the presence of squatters on the subject land. Following the said purchase, the plaintiff commenced eviction proceedings against the squatters. The plaintiff succeeded in obtaining judgment where the court ordered that the squatters I surrender vacant possession of the subject land to plaintiff. By

letter dated 28 April 2004 to the second defendant (D2), the plaintiff's solicitors demanded that C2 cease supply of electricity and remove all structures in connection with the supply. The plaintiff commenced the present suit due to D2's refusal to comply with the demand. The crux of the plaintiff's pleaded case was that by supplying electricity to the squatters on the land without authority D2 had (i) trespassed onto the subject land by the emplacement of supply conduits, structures and other elements on the subject land connected to the supply of electricity to the squatters and/or (ii) facilitated and/or aided or abetted the trespass by the squatters on the subject land on account of the second defendant's supply of electricity to such squatters and were also liable as joint tortfeasors. The defence counsel, however, argued that (a) D2 could not be held liable for trespass in view of its statutory obligation under the Electricity Supply Act 1990 ('ESA'), particularly the duty imposed by s. 24 of the ESA to supply electricity on request; (ii) the plaintiff had failed to distinguish between the lots owned by the plaintiff and the rest of the land by failing to demarcate its 48 lots from the remaining lots, thus it could not be ascertained with any degree of certainty that D2's power lines, structures, conduits etc had encroached into any of the plaintiff's lots; (iii) D2 sought to admit a letter dated 2 December 1989 ('ID1') which purported to contain an authorisation by Oakfield to TNB to supply electricity to the occupants.

Held (second defendant liable for trespass to an extent):

(1) The High Court had come to a determination as to the status of the illegal occupants to whom D2 had been supplying electricity. Henceforth, the illegal occupants did not have the authority to allow TNB as licensee to place any structures on the land of its cables/wires to run over the plaintiff's lots which would be trespass. A valid and subsisting High Court order declaring the occupants' status as squatters/trespassers had been served on D2. D2 had to comply with the plaintiff's demand to cease supply of electricity premised on a valid and enforceable order, failing which it exposed itself to a claim for trespass. D2's obligation to supply power under the ESA ceased as to hold otherwise would be to condone abetment of illegal occupation. Hence, the defence contention that D2 could not be held liable for trespass was, under the

circumstances, misconceived. D2, as a public utility provider may have, given the prevailing circumstances, acted reasonably in accordance with its statutory obligations in supplying power to the occupants but had failed to discontinue the trespass when due notice of illegal occupation had been given. (paras 20 & 23)

(2) The plaintiff had *vide* its solicitors' letter of 28 April 2004 put D2 to notice that the court had determined that the occupiers on the plaintiff's land who had been supplied electricity were trespassers. The lot numbers owned by the plaintiff were supplied and so was the court order. D2 did not comply without any reply being given of its stand on the demand. Contrary to the defence raised there was no evidence of any response from D2 to the effect that the plaintiff's lots could not be identified from the entire piece of land. The occupants being squatters were strangers to the plaintiff whereas D2 was in possession of records showing their identities and location of the households that had electricity supply. These facts were clearly within the exclusive knowledge of D2, which was fortified by the evidence of D2's witnesses themselves. Furthermore, all houses or lots demolished in execution of the court order had electricity supply connected. Hence, the issue of non-identification or demarcation of the plaintiff's lots did not arise under the peculiar circumstances of this case. It was improbable and incredible for D2's supply lines not to have encroached into the plaintiff's land. (para 34)

(3) D2 faced two significant obstacles in seeking to admit ID1 as evidence against the general rule of admission of documentary evidence. First, that the maker was not called as a witness and second, that ID1 was only a photocopy without evidence as to the whereabouts of the primary evidence ('the original document'). Neither did it have any certification that it was a true copy of the original. Thus, the strict requirements for admission of ID1 as evidence under the relevant provisions of the Evidence Act - s. 65 and s. 73A - had not been complied with and it was ruled that ID1 was not admissible. (paras 38 & 42)

(4) D2 did not have a *bona fide* defence in this case and any assertion that D2 did not trespass on the subject land in order to supply electricity to the squatters was incredible for being

against the weight of evidence. However, there was no sufficient evidence of D2 having intentionally facilitated trespass or illegal occupation of the subject land. Neither could D2 be held liable as joint tortfeasors with the squatters with other utility corporations in the absence of evidence sufficient to prove that it had acted in concert or conspired with these parties to instigate the alleged trespass. The plaintiff had failed to discharge, on a balance of probabilities, the burden of proving these prayers of the claim. To conclude, the plaintiff had established the cause of action of trespass against D2 independently until termination of power supply to the illegal occupants and demolition/removal of D2's supply structures and lines. D2 was held liable for trespass to this extent. (paras 36 & 45-46)

[Order accordingly.]

Case(s) referred to:

Bowskill v. Dawson & Anor [1953] 2 All ER 1393 ***(refd)***

Cahaya Utama Industries Sdn Bhd v. Kong Kam Peng [2007] 10 CLJ 79 HC ***(refd)***

Chatib Kari v. Mosbert Bhd [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 HC ***(refd)***

Evon v. Noble [1949] 1 KB 222 ***(refd)***

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

Karuppannan Chellapan v. Balakrishnan Subban [1994] 4 CLJ 479 FC ***(refd)***

Kelsen v. Imperial Tobacco Co (Of Great Britain and Ireland), Ltd [1957] 2 All ER ***(refd)***

Lim Guan Eng v. PP [2000] 2 CLJ 541 FC ***(refd)***

Lucas v. Williams & Sons [1892] 2 QB 113 ***(refd)***

Mosbert Bhd v. Chatib Kari & Another Case [1984] 2 CLJ 277; [1984] 1 CLJ (Rep) 270 FC ***(refd)***

Oakfield Enterprises Sdn Bhd v. Tenaga Nasional Bhd [1998] 1 LNS 430 HC ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Senik v. Hassan & Anor [1963] 1 LNS 120 HC ***(refd)***

Sri Alam Sdn Bhd v. Tenaga Nasional Bhd [1995] 1 LNS 227 HC ***(dist)***

Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC ***(refd)***

Works v. United Telephone Co (7) [1884] 13 QBD 904 ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, s. 24(1)
Evidence Act 1950, ss. 61, 63(b), 65, 73A(1), (2), (3), 103

Other source(s) referred to:
Halsbury, Laws of England, 4th edn, vol 45, pp 380, 631

For the plaintiff - Mathew Thomas Philip; M/s Thomas Philip
For the 2nd defendant - Balvinder Singh (Gurmel Singh with him); M/s Illiayas

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JC:

[1] This case has a peculiar history of its own dating back to the 1980s where the subject matter of the claim ('the subject land') had undergone a series of litigations culminating in the present suit by the current owner, the plaintiff ('P'). The trial proceeded in respect of the second defendant ('D2') only, as the claim against the other two defendants had been settled.

Summary Of Facts

[2] The subject land owned by P, situated in the Mukim of Plentong, Johor Bahru, comprises 405 individual lots. It was purchased from one Oakfield Enterprises Sdn Bhd (Oakfield).

[3] In 1989, Oakfield brought an action against the occupants ('squatters') on the subject land and obtained an order against them on 8 November 1989. Some three years later, Oakfield commenced an action against D2 alleging trespass onto the subject land in connection with supply of electricity to squatters. The case did not proceed but was struck off on 2 November 2000 for want of prosecution.

[4] Sometime in 1997, after having purchased the subject land from Oakfield, P commenced an action against the squatters by recourse to the summary process under O. 89, RHC 1980. The High Court granted the summary order but, on appeal, it was set aside by the Court of Appeal together with a direction that the

action be converted to a writ action. Pursuant to the direction, P commenced a writ action at the Johor Bahru High Court *vide* Civil Suit No. 22-480-2000.

[5] In 2002, P instructed its solicitors to issue letter dated 23 November 2002 to D2 to forthwith cease supply of electricity to the squatters on the subject land and to remove all structures erected for the purpose of the supply D2 did not comply with the demand.

[6] On 28 April 2003 P succeeded in obtaining judgment in the Civil Suit No. 22-480-2000 where the court ordered that the squatters surrender vacant possession of the subject land to P. Execution of the judgment was however stayed pending appeal to the Court of Appeal. By letter dated 28 April 2004 to D2, P's solicitors demanded that D2 cease supply and remove all structures in connection with the supply. P commenced the present suit due to D2's refusal to comply with the demand.

[7] On 13 April 2007, the squatters' appeal to the Court of Appeal against the High Court decision was dismissed following which an application for leave to appeal to the Federal Court was also turned down.

[8] Finally P proceeded to execute the judgment against the squatters on two occasions – December 2008 and January 2009 – in the presence of D2's representatives. In compliance with the court order, D2 duly removed all structures, transmission lines and meters from the subject land that had enabled electricity to be supplied to the squatters and thereby, ceased supply to them.

Plaintiff's Case

[9] The crux of P's pleaded case was that by supplying electricity to the squatters on the land without authority D2 had:

(1) trespassed onto the Subject Land by the emplacement of supply conduits, structures and other elements on the Subject land connected to the supply of electricity to the squatters; and/or

(2) facilitated and/or aided or abetted the trespass by the squatters on the Subject Land on account of the 2nd Defendant's supply of electricity to such squatters and also are liable as joint tort-feasors.

D2 (TNB)'s Defence

[10] Defence counsel set out the broad defences raised as:

(a) TNB denies the P's claim and puts P to strict proof of the claim;

(b) the occupants on the said land prior to its transfer to P were in lawful occupation of the same based on previously decided cases in respect of the land;

(c) TNB does not have in its possession information on the particulars of the occupants as P had failed to disclose the same;

(d) TNB is not able to prepare its defence with regard to the alleged trespass of the said land as P had failed to disclose the particulars of the parties that were purportedly supplied with electricity by TNB;

(e) In the alternative, TNB avers that the electricity was supplied with the consent, agreement and/or directions from the previous owner of the land;

(f) TNB relies on the principles of estoppel and "*res-judicata*";

(g) TNB also pleads the doctrine of laches, waiver and acquiescence.

The Material Evidence

[11] As correctly observed by D/C, the subject land appears to have had a chequered history between the previous registered owners, and now P, and the occupants. It was the subject of numerous suits between the occupants and the owner. D/C submitted that having traced the history of the subject land there was ample evidence in various judgments of the High Court, Court of Appeal and the Federal Court which showed that all along the occupants were not squatters simpliciter as P had made them out to be.

[12] D/C referred to, *inter alia*, *Chatib Kari v. Mosbert Bhd* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 (HC, Johor Bahru) and *Mosbert Bhd v. Chatib Kari & Another Case* [1984] 2 CLJ 277; [1984] 1 CLJ (Rep) 270 (FC). This case which was finally

decided at the Federal Court involved individual purchasers of approximately 300 lots from the previous owners way back in 1967. The Federal Court held that there can be no doubt that the purchasers' interest in the said land was not merely contractual but also equitable in nature; and that their rights and interests in the said land were beyond challenge. The purchasers' equitable rights were also recognised in several subsequent cases.

[13] The above position of the occupiers then was as *bona fide* purchasers in the year 1967. However, as far as the present case is concerned, the relevant consideration would be the status of the occupants at the material time. It has now been determined that they were trespassers on the land without right of occupation, whether legal or equitable.

[14] P purchased the subject land from Oakfield Enterprise Sdn Bhd ('Oakfield') through a Sale and Purchase Agreement dated 15 May 1996. P was aware at that time of the presence of squatters on the subject land. Even though Oakfield was said to have obtained a court order against the squatters it was facing difficulties in evicting them. Following the purchase, P on its own commenced eviction proceedings against the squatters. P came to know that D2 supplied electricity to the squatters who had built houses, shops and other buildings on the subject land. To enable this supply of electricity, D2 had erected electricity poles, pylons with transmission lines, meters, lamp posts, electrical cables and other conduits on the land. P had at no time authorised D2 to enter the land and erect the structures, which D2 alleged had already been erected when P purchased the land. P then demanded *vide* letters of demand dated 23 November 2002 and 28 April 2004 that D2 immediately cease supply of electricity to the squatters. The second letter put D2 to notice of the court order dated 28 April 2003 and also that D2 was in fact facilitating the squatters' continuous trespass of the subject land. D2 did not respond positively to the demand.

Findings On Issues

Trespass

[15] Every wrongful entry into land, however slight, in the rightful possession of another constitutes trespass that is actionable *per se* without proof of actual damage. A clear definition is to be found in *Halsbury's Laws of England* (4th edn) vol. 45 at p. 631 which states:

> Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land.

[16] Defence Counsel (D/C) highlighted the position in law that the tort of trespass is concerned with injury to one's possession or possessory right of the land allegedly trespassed upon. As such, an action in trespass would not succeed without proof of possession. He submitted that P was required to demonstrate exclusive possession and control of the said land with the right to exclude the occupants thereon. In support of this proposition, the case of *Senik v. Hassan & Anor* [1963] 1 LNS 120, *Cahaya Utama Industries Sdn Bhd v. Kong Kam Peng* [2007] 10 CLJ 79 was cited where it was held:

> Whether a person is an actual possession or not is a question of fact. Actual possession involves the consideration of two elements: the intention to possess the land and the exercise of control over it to the exclusion of others [Halsbury's Laws Of Malaysia, vol. 5, p. 380] [p. 17 of BOA].

[17] A point of contention by the defence was that D2 could not be held liable for trespass in view of its statutory obligation under the Electricity Supply Act, 1990 ('ESA'), particularly the duty imposed by s. 24 of the ESA to supply electricity on request. Section 24(1) states, *inter alia*, that TNB as licensee shall upon being required to do so by the owner or occupier supply electricity to those premises. Two questions, in my view, arise out of this statutory obligation in relation to an action for trespass. First, whether discharge of a statutory obligation is a recognised defence for an act of trespass. Second, whether the term 'occupier' would include an illegal or unlawful occupier.

[18] No doubt the statutory duty of TNB as a public utility body to supply electricity on the request of any occupier has been recognised in several cases. Likewise, that TNB is not authorised to decide whether the occupier making the request is in lawful or

unlawful occupation of the land. Also, under the ESA no distinction is made between legal and illegal occupants [*Sri Alam Sdn Bhd v. Tenaga Nasional Bhd* (1995) 1 LNS 227]. However, the question was whether its statutory duty absolved TNB from liability for trespass for knowingly supplying electricity to occupants known to be in illegal occupation. No authority was cited for the contention that TNB could not be held liable in this situation.

[19] The case of Sri Alam Sdn Bhd *(supra)* was an action brought by the plaintiff as beneficial owner to restrain TNB from continuing to supply electricity to 123 houses on the ground that the houses were being occupied illegally without plaintiff's consent. It was held that in view of TNB's mandatory obligation under s. 24 of the ESA, in the event that an occupier makes an application for the supply of electricity, the owner cannot object to the same as the ESA provides for distinct rights to the owner and occupier to apply for electricity. Further, that the ESA does not distinguish between legal and illegal occupants. The court also recognised TNB's role as a public utility body in the supply of electricity to occupants of land and in the event of dispute between the owners and occupants as to the legality of the occupation, this issue ought to be brought to court for determination.

[20] While I agree with the above decision, the facts of the instant case were clearly distinguishable in that the High Court had come to a determination as to the status of the occupants to whom D2 had supplied electricity and D2 had been duly put to notice of the court order with reference made to the specific lots owned by P. Granted that a stay pending appeal had been granted but that only concerned eviction of the occupants. It did not alter their status as determined by the court and henceforth they did not have the authority to allow TNB as licensee to place any structures on the land of its cables/wires to run over P's lots which would be tresspassing. As rightly contended by P/C, from this point onwards D2 continued to supply electricity to the illegal occupants at its own periods, exposing itself to a claim of trespass. The present situation was different from that in Sri Alam Sdn Bhd where the plaintiff demanded that electricity supply to the houses be discontinued on the contention that it was the beneficial owner of the houses which were being occupied illegally whereas in this case the issue of illegal occupation had already been determined

by the court. Hence, the defence contention that, based on the court's observation in the above case of TNB's obligations, D2 in our case cannot be held liable for trespass was, under the present circumstances, misconceived.

[21] D/C submitted that prior to the final determination by the Federal Court on the rights of the occupants in the present case, previous reported decisions on the occupants of the land suggested that they were not squatters *simpliciter* and some cases even suggested that they had equitable rights to the land. As such, given the competing claims, TNB was not only entitled to but mandated to supply electricity to the occupants under s. 24 of the ESA upon their application. It was rightly pointed out that the law is trite that whether a person has possessory rights or not is one of fact to be determined by a court of law and not for TNB to resolve the dispute as to the rights to the land which may have existed between the occupants and P or its predecessors in title.

[22] The question arising was whether until the final appeal to the Federal Court, D2 could regard the status of the occupants as not having been settled and continue to supply power to them? As a valid and subsisting High Court order declaring their status to be squatters/trespassers had been served on D2, I did not think that D2 could disregard the demand of the owners to discontinue the trespass on P's land by reason of the pending appeal which was a matter strictly between P and the defendants in that case. The appeal process up to the apex court did not concern D2 who were not a party to that action. D2 had to, in my view, comply with the demand premised on a valid and enforceable order, failing which it exposed itself to a claim for trespass. The argument that D2 could ignore the demand in view of the pending appeal without responding was, in my view, untenable.

[23] Compared to the *Sri Alam* case the present occupants may originally have been in a better position *vis-a-vis* their rights to remain on the said land. D/C referred to the evidence that showed the area within the 523 lots which had been provided with the necessary infrastructure such as basic amenities, street names with signages and the like although there was no proof of the local government having approved the buildings. However, this better position was perhaps a justification for D2 to supply power when they applied for it in accordance with s. 24 of the ESA but

it is noteworthy that whatever rights they appeared to have at that time were extinguished once the High Court declared them to be trespassers without any rights of occupation. This meant that D2's obligation to supply power ceased as to hold which otherwise would be to condone abetment of illegal occupation. It is trite that a continuing trespass amounts to a fresh trespass that founds a new cause of action [*Homes v. Wilkinson* (1839) and *Bowyer v. Cooke* (1847)]. D2, as a public utility provider, may have given the prevailing circumstances acted reasonably in accordance with its statutory obligations in supplying power to the occupants but had failed to discontinue the trespass when due notice of illegal occupation had been given.

The Plaintiff's Land – Failure To Identify The Lots Encroached Upon

[24] It was undisputed that P's land comprised part of larger piece of land held under Lot 83, Grant 72, Mukim of Plentong, District of Johor. Upon subdivision into 523 lots, each lot was issued its separate title. P purchased only a total of 407 lots compared to Oakfield which had more lots. The 407 lots had a land area of 65 acres while the remaining lots of 48 acres in area from the land previously held under Lot 83, Grant 72 did not belong to P. It is out of this position that D2's main contention arose, which is that P had confused its land with the larger piece of land held under the original title prior to subdivision and thus, had failed to specifically identify its lots to prove that D2 had encroached onto these lots. There was a possibility that in supplying power, D2 had only encroached into the remaining lots not owned by P and the onus of proof was on P to prove that such was not the case. This contention was in line with the thrust of the pleaded defence that D2 was not in a position to refute the allegation of trespass of P's land as P had failed to disclose particulars of the parties who had purportedly been supplied with electricity by D2.

[25] D/C submitted at length on P's failure to distinguish between the lots owned by P and the rest of the land. P was said to have failed to demarcate its 48 lots from the remaining lots, the point being that it could, thus, not be ascertained with any degree of certainty that D2's power lines, structures, conduits, etc. had encroached into any of P's lots. It was submitted that P bore the burden of proving trespass in this sense, which was as alleged in

para. 22 of the statement of claim ('SOC') confined to the boundaries of the 407 lots purchased and owned by P. Any claim over road reserves and common areas shown in the layout plan (exh. D3) was said to be unsustainable. Further, that P had the onus of producing particulars identifying the lots and of the manner in which trespass occurred on each lot. The defence was that without these particulars being strictly proved, there was nothing for D2 to respond.

[26] D/C stressed the fact that P, through their only witness (PW1) had failed to produce a valid survey plan identifying the said 407 lots which were the subject-matter of the present claim whereas D2/TNB had produced exh. D3. PW1, who knew about the subdivision and that P only owned 407 lots out of the whole area previously owned by Oakfield, could not identify the specific lots owned by P that were alleged to have been encroached upon or trespassed by P. It was submitted that the identity and location of the lots were elementary evidence that P had to adduce for an action in trespass to succeed. Further, that, in this regard a physical, survey plan was incumbent to be produced to indicate the perimeters of P's land and to prove that one or more of P's lots had been encroached upon by D2.

[27] It was undisputed, as admitted by PW1 himself, that less than 50% of the houses on the entire land (523 lots) had been supplied with electricity. PW1, however, insisted that there were no less than 400 structures placed by D2 on the land, which D2 disputed. He, however, admitted that a proper survey to ascertain the location of the structures could not be carried out due to difficulties of access to the designated area. As such, according to D/C, it could be surmised from the totality of PW1's evidence that there was nothing whatsoever to prove encroachment into any of the 407 lots belonging to P. Neither as to the manner and/or extent of the alleged encroachment whereas D2's evidence that only some of the houses, specifically those along the main roads, were supplied with electricity (see evidence of DW4 and DW5 – TNB officers) was unrebutted.

[28] In essence, the defence contention was that based on P's evidence in its entirety, P was seeking to merely rely on assumptions and conjecture on the issue of encroachment into its land and asking the court to make a speculative finding that D2's equipment or structures must have encroached into one or more

of P's 407 lots. P's stance was said to be premised on the erroneous assumption that the entire land, including the road reserves belonged to P and that P need only prove encroachment into any part of the land to sustain this claim against D2 for trespass.

[29] Plaintiff's counsel ('P/C') contended that D2's position that it was unable to determine who were being supplied electricity in the subject land as a defence to the present claim was wholly irrelevant and in any event, untenable. The reasons for this contention were, *inter alia*, that the allegation of supply to squatters on the subject land was nothing new as the previous owner had commenced an action against TNB on the same land in 1989 [*Oakfield Enterprises Sdn Bhd v. Tenaga Nasional Bhd* [1998] 1 LNS 430. According to D/C, the 61 lots involved in this case did not belong to P. The point being made was that D2 must have known exactly the lots to which power had been supplied and the location of its supply structures. It was all the more so as TNB had successfully defended the suit in which the High Court held that its pylons and transmission lines had been lawfully erected on the lots in question. Secondly, that D2 did not seriously dispute the facts raised in P's letters of demand in 2002 and 2004 except to maintain that the supply was lawful.

[30] More importantly, P placed reliance on the evidence of key defence witnesses which seemed to indicate beyond doubt that TNB had the relevant information pertaining to the houses on P's land which had been supplied with electricity which was subsequently disconnected during the execution process by P. DW4, the branch manager of TNB, Johor Jaya, who had supervised the disconnection during that process, admitted that D2 had details of the closed accounts for the 100 over houses which had electricity supply disconnected by reason of the execution. He also admitted that after the said process, the meters were taken back to the office and the final reading taken for record purposes. The records were still with D2. Also that a name search of the squatters on P's land could be carried out to determine whether they had been supplied electricity. He further admitted that D2 had details and records of all the squatters on the said land who had been provided electricity by TNB. Similarly, DW3, an Assistant Manager of the Consumer and Marketing Department at TNB's Head Office, admitted in his evidence that

searches could be done that would reveal whether a particular individual was a customer of D2 and similar searches could be done by reference to the addresses of the said individuals.

[31] It was apparent from the above that with details of names and addresses (lot numbers) D2 had records that enabled it to trace whether a particular household had been supplied electricity. If the lots on which the households were located belonged to P, it followed that D2's structures must have encroached into P's land. It would be incredible to suggest that such a consequence did not follow. In this regard, P/C argued that D2's belated attempt at the trial to suggest during cross-examination of its main witness (DW4) that its structures had been erected on road reserves was on a matter not pleaded on which no evidence could be led. He cited in support the Federal Court case of *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430 where the relevant part of the judgment (per Zaki Tun Azmi CJ) reads at p. 438:

> The effect of a judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the latin maxim *audi alteram partem*, which literally means, to hear the other side, a basic principle of natural justice.

[32] In the instant case, the issue of D2's structures being on road reserves was never as part of the averments in the Defence and as such, was never addressed by P in its case. This issue should, thus, not be considered in deciding this case in accordance with established rules of pleadings.

[33] In any event, the above issue involves the existence of a particular fact and therefore, the burden of proof of that fact lies on D2 (s. 103, Evidence Act, 1950). However, as pointed out by P/C, the evidence of DW4 on this point was weak and far from satisfactory. It was contradictory and unsupportive of the fact alleged as well as unable to rebut the assertion that D2's transmission lines and meters went over and/or on the subject land. The evidence was clearly not of sufficient strength to discharge the burden of proving this particular fact. My attention was drawn to a case in point, *Kelsen v. Imperial Tobacco Co (Of Great Britain and Ireland), Ltd* [1957] 2 All ER which states:

> In Wandsworth Board of *Works v. United Telephone Co* (7) [1884], 13 QBD 904), one of the questions at issue was whether a telephone line running across a street constituted a trespass as

A against the local authority in whom the street was vested. The main contest in the case was as to the extent of the vesting in the local authority, the conclusion being reached that they did not have vested in them the air space above the street beyond what was necessary for its use as a street; but I think that each of the
B learned lords justices in that case was quite clear in his conclusion that, if the street and the air space above it had been vested in the local authority, the passage of a telephone line through that air space would have constituted a trespass and not a mere nuisance.

C **[34]** In summary, this is my finding on the issue whether this action should fail for non-identification by P of the lots that were alleged to have been trespassed upon by D. P had *vide* its solicitors' letter of 28 April 2004 put D2 to notice that the court had determined that the occupiers on P's land who had been
D supplied electricity were in illegal occupation or trespassers and thus, demanded that all structures erected by P be dismantled and removed. The lot numbers owned by P were supplied and so was the court order. D2 did not comply without any reply being given of its stand on the demand. Contrary to the defence raised there
E was no evidence of any response from D2 to the effect that P's lots could not be identified from the entire piece of land. The occupants being squatters were strangers to P whereas D2 was in possession of records showing their identities and location of the households that had electricity supply. These facts were clearly
F within the exclusive knowledge of D2, which was fortified by the evidence of D2's witnesses themselves. Furthermore, all houses or lots demolished in execution of the court order dated 28 April 2003 had electricity supply connected. Hence, the issue of non-identification or demarcation of P's lots did not arise under
G the peculiar circumstances of this case. From DW4's evidence on how electricity was connected, it was improbable and incredible for D2's supply lines not to have encroached into P's land.

[35] D/C himself conceded that the law of torts on trespass was
H harsh on trespassers in that even the slightest intrusion into land in the possession of another was sufficient to sustain a claim in trespass. The liability for trespass was, as such, strict against the trespasser in favour of the person in possession of land as even the slightest crossing of the boundary of land is sufficient to
I constitute trespass (*Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657). Given the state of the law, D/C submitted that it was imperative for P to be required to prove the trespass with precision and that, in this case, a precise and

detailed survey plan was an elementary requirement to establish trespass. However, under the circumstances of this case, I did not think that this was an elementary requirement as the perimeters of the subject land were well known to the parties.

[36] In the above circumstances, I found that based on P's evidence as well as that of D2 itself, the pleaded cause of action in trespass had been established. I upheld P's submission that D2 did not have a *bona fide* defence in this case and any assertion that D2 did not trespass on the subject land in order to supply electricity to the squatters was incredible for being against the weight of evidence.

Consent To Supply Electricity

[37] This was one of the defences raised by D2 based on a letter dated 2 December 1989 (ID1) purportedly acknowledged by Oakfield through one 'J Singh' ID1 was an uncertified photocopy of a letter issued by one 'Amin bin Syawal'. It was sought to be admitted as secondary evidence through DW2 who was not the maker of the letter but his signature appears at the bottom together with his rubber stamp without any independent evidence when or if in fact his name was stamped on the original document.

[38] D2 faced two significant obstacles in seeking to admit ID1 as evidence against the general rule of admission of documentary evidence. First, that the maker was not called as a witness and second, that ID1 was only a photocopy without evidence as to the whereabouts of the primary evidence ("the original document"). Neither did it have any certification that it was a true copy of the original. ID1 was sought to be admitted as evidence through DW5, who clearly appeared to be a partisan witness as a previous squatter on the subject land. DW5 was also named as a defendant in two separate proceedings brought by Oakfield and P to evict the squatters from the land. He was certainly not an independent witness at the material time capable of giving impartial evidence. Hence under s. 73A(3), Evidence Act, his evidence regarding the disputed document sought to be admitted cannot be rendered admissible.

(See also *Bowskill v. Dawson & Anor* [1953] 2 All ER 1393, per Devlin J at p. 1394).

A person can be regarded as being not an interested party only if he is being "completely detached, judicial, impartial and independent" (*Evon v. Noble* [1949] 1 KB 222).

[39] By virtue of s. 61 of the Evidence Act, 1950 ('EA') the contents of documents may be proved either by primary or secondary evidence. A party may have recourse to the latter when a proper explanation of the absence of the former has been given (Lord Esher, MR in *Lucas v. Williams & Sons* [1892] 2 QB 113). In this case, the only explanation given was that the original typewritten document was given to J Singh of Oakfield at the office of his law firm ("J Singh & Co") while DW5 kept the carbon copy. There was no explanation why he could not produce the duplicate carbon copy instead of the photocopy which he produced without any evidence that it had been made from the original or duplicate. Therefore, ID1 did not qualify for production under s. 63(b) of EA 1950. It is clear from Illustration (b) that the copy must be shown to have been made from the original. More importantly, there was without doubt no proper explanation for absence of the original. There was absolutely no supporting evidence from Oakfield that it had been handed over to the office or that it could no longer be located, apart from DW5's own self-serving statement.

[40] DW5's evidence as a whole on how ID1 came to be signed by the late J Singh, who had since passed on, as an acknowledgement of consent to the request therein, was fraught with doubts and contradictions that seriously affected his credibility. The typewritten part of ID1, which was its main body, was signed by one Amin b Syawal, who too had since passed on. He was, as the signatory, clearly the maker of the statement and not DW5 as alleged. DW5, however at first instance claimed that he had typewritten the letter himself before being signed by both Amin and J Singh in his presence. He too then signed on J Singh's instruction. However, when confronted in cross examination that the font of the words bearing his name was different from the font of the names of Amin and J Singh which seemed to be part of the letter compared to his which seemed to have been added on, he admitted that his name had in fact not been typed but rubber stamped. Apart from having contradicted himself, his evidence that he had brought along his rubber stamp, as if in anticipation, was highly incredible and not likely to be true. DW5 also admitted to being aware of the earlier proceedings by which time ID1 was already in existence. Both DW5 and Amin were among the

squatters named in these proceedings as defendants. Yet, ID1 which purported to contain an authorisation by Oakfield to TNB to supply electricity to the occupants was not used in the proceedings even though it appeared very material to their defence if in fact it existed. Hence, in all probability, ID1, especially the signature of J Singh, was not genuine but a subsequent creation. It is trite law that where evidence presented on an important issue is riddled with conflicts, its value diminishes. My attention was drawn to the following passage from the judgment of Siti Norma Yaakob, JCA (as she then was) in *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324:

> … in cases where conflicting evidence are presented before a Court, it is the duty of the Court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the Court, to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact …

[41] ID1 is not admissible under s. 73A(1), EA as it is a photocopy whereas this subsection requires the original document to be tendered. As such, the condition precedent set out in s. 73A(1) has not been fulfilled for admission of ID1. It is trite law that "s. 73A should be read as a whole. The subsections should not be read in isolation of one another …" (*Lim Guan Eng v. PP* [2000] 2 CLJ 541 (FC)). Similarly, D2's attempt to rely on s. 73A(2) to admit ID1 as evidence was, in my view, misplaced based on the nature of DW5's evidence itself which was, on the whole, doubtful and incredible for the reasons adverted to earlier. Amongst others, there was hardly evidence of any attempts made to call material witnesses to produce the original document or to provide a satisfactory explanation for its absence. Likewise, no explanation was offered why ID1 only surfaced in the present proceedings whereas if it existed as alleged, it was not used as defence evidence by D2 against the plaintiff on Oakfield's previous actions. This, in turn, raised doubts as to its genuineness. The onus was on D2 to satisfy the court that the circumstances envisaged in s. 73A(2) did in fact exist for the court to exercise its discretion to admit ID1 as an exception to the general rule under s. 73A(1).

[42] For the above reasons, I held that the strict requirements for admission of ID1 as evidence under the relevant provisions of the Evidence Act – s. 65 and s. 73A – had not been complied with and thus, ruled that ID1 was not admissible. The same applied to

the signature of J Singh on ID1 (ID1A). There was, further, no independent, corroborative evidence that he had affixed his signature as alleged and of the circumstances under which he had done so. It was also most unlikely and highly improbable for him to have given the said consent when Oakfield had just instituted an action through his firm to evict the squatters. In the circumstances, in view of the above ruling, the question of consent or acquiescence by P to the supply of electricity or trespass by D2 did not arise and in any event, was not proved.

Conclusion

[43] From my analysis of the evidence in its totality, I found that P had, on a balance of probabilities, made out a case of trespass against D2 who did not have a valid defence against the act of trespass. Facts regarding the part of the subject land and the relevant lots owned by P to which electricity had been supplied by D2 were well within the latter's knowledge. Therefore, the defence that the lots could not be identified was unsustainable. It is to be noted that the law of trespass is strict in its application in that every slight intrusion into the lawful space of another against his exclusive use and enjoyment of land in his possession is considered trespass that is actionable *per se*. As held by the Federal Court in the case of *Karuppannan Chellapan v. Balakrishnan Subban* [1994] 4 CLJ 479 in the judgment of Hj Lamin Hj Mohd Yunus, FCJ (as he then was):

> The Code ("The National Land Code") provides that any person or body to whom land has been alienated, reserved land has been leased or temporary occupation license has been granted in respect of any land "shall be entitled to the exclusive use and enjoyment of so much of the column of air space above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land." In clear terms the law has spelt the right of an individual over his land. He is given the "exclusive use and enjoyment" of the air space above the surface of his land though not right to heaven above.

[44] On the evidence as to how the supply of electricity had been connected to the households in the subject land, it was improbable and incredible for D2's lines and structures not to have encroached or trespassed onto P's land. The degree and extent of encroachment was a different issue to be dealt with in the assessment of damages. I found on the facts that a cause of

action grounded in trespass had been established against D2 beginning from the date the court judgment declaring the occupants to be squatters/trespassers occupying the land unlawfully had been communicated to D2. As D2 had been put to notice of the continuing trespass, it was by its conduct in continuing to supply electricity is liable for trespass beginning from the time of notification for failing to comply with the demand to discontinue the trespass. However, as a public utility body carrying out duties and obligations mandated under provisions of law ('ESA') to provide electricity to the occupants of the subject land, D2 cannot be held liable for trespass prior to the notification that they had been declared trespassers. D2 was then not in a position to ascertain their actual status and neither did it have any authority to do so under ESA. To impose liability on D2 in these circumstances would be too burdensome in view of its role and obligations to the public.

[45] Even though I held that ID1 and ID1A, which D2 sought to adduce to show consent or acquiescence, were not admissible for not having complied with the conditions for admission under s. 73A, EA, I did not find sufficient evidence of D2 having intentionally facilitated trespass or illegal occupation of the subject land. Neither could D2 be held liable as joint tortfeasors with the squatters with other utility corporations in the absence of evidence sufficient to prove that it had acted in concert or conspired with these parties to instigate the alleged trespass. P had failed to discharge, on a balance of probabilities, the burden of proving these prayers of the claim.

[46] To conclude, I found that P had established the cause of action of trespass against D2 independently as per para. 24.3 of the SOC until termination of power supply to the illegal occupants and demolition/removal of D2's supply structures and lines. I, therefore, held D2 liable for trespass to this extent and ordered that damages be assessed by the registrar.